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## Advisory Opinion 08-017

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below. All public data the Commissioner relied upon to issue this opinion are available for public inspection and copying at the office of the Information Policy Analysis Division (IPAD), unless the data have been disposed of in compliance with the state Records Management Act.

### Facts and Procedural History:

On June 3, 2008, IPAD received a letter dated same, from Sheila Gebhard, on behalf of the Department of Natural Resources (DNR). In her letter, Ms. Gebhard asked the Commissioner to issue an advisory opinion regarding the classification of certain data the DNR maintains. To her opinion request, Ms. Gebhard attached comments relating to the data classification issue from Paul Hannah, an attorney representing the *Pioneer Press*.

In a letter dated June 9, 2008, IPAD invited Mr. Hannah to submit comments on the issues raised by Ms. Gebhard. He did so in a letter dated June 24, 2008.

A summary of the facts as Ms. Gebhard provided them is as follows.

On April 2, 2008, the Minneapolis Star Tribune requested DNR data involving the 2007 North American Wildlife Enforcement Officer Association (NAWEOA) Conference. All public data were provided to the Star Tribune. Subsequently, several news stories were published beginning May 5, 2008, that included alleged violations of state law by the DNR.

As a direct result of the news stories the following took place:

- On May 5, 2008 the Office of the Legislative Auditor notified DNR Commissioner Holsten that an investigation into DNR activities related to the conference would take place.
- A legislative hearing was held on Friday May 9, 2008, to discuss and review alleged violations. At the hearing, DNR Commissioner Mark Holsten informed Legislators that an external firm would also be hired to investigate any DNR employee violations that may have occurred while preparing and hosting the NAWEOA Conference.
- On Monday May 12, 2008, two DNR employees were placed on administrative leave while the internal investigation takes place.
- A contract with the Parker Rosen Law Firm was issued to investigate employee misconduct, effective date May 13, 2008, or as soon as the State obtained all required signatures. All signatures were obtained on May 16.

On May 14, 2008, the DNR received an email from Mr. Chris Niskanen, Pioneer Press, asking for access to all documents previously requested by the [Star Tribune] that related to the conference and its organizers and attendees, including written correspondence and emails. In addition, the request was for all subsequent documents relating to the conference since the Star Tribune's request, including documents relating to the investigation of the conference and correspondence among DNR employees about the investigation....

Ms. Gebhard provided a copy of the data request to the Commissioner (of Administration).

Ms. Gebhard responded to the data request in a May 21, 2008, email:

Because of an internal investigation and a legislative audit involving DNR activities relating to the NAWEOA conference, all DNR data related to the conference is currently classified as confidential data on individuals or protected nonpublic data not on individuals under Minnesota Statutes, section 13.392.

### **Issue:**

Based on Ms. Gebhard's opinion request, the Commissioner agreed to address the following issue:

Pursuant to Minnesota Statutes, Chapter 13, what is the classification of certain data maintained by the Minnesota Department of Natural Resources (DNR) that relate to the North American Wildlife Enforcement Officer Association conference and subsequent DNR investigation?

### **Discussion:**

Pursuant to Minnesota Statutes, Chapter 13, government data are public unless otherwise classified.

Of relevance here, the following data are classified by section 13.392, subdivision 1:

Data, notes, and preliminary drafts of reports created, collected, and maintained by the internal audit offices of government entities, or persons performing audits for government entities, and relating to an audit or investigation are confidential data on individuals or protected nonpublic data until the final report has been published or the audit or investigation is no longer being pursued actively, except that the data shall be disclosed as required to comply with section 6.67 or 609.456. This section does not limit in any way:

- (1) the state auditor's access to government data of political subdivisions or data, notes, or preliminary drafts of reports of persons performing audits for political subdivisions; or
- (2) the public or a data subject's access to data classified by section 13.43.

Section 13.392 classifies data maintained by internal audit offices of government entities or persons performing audits for government entities. Section 13.392 does not define "audit." Minnesota Statutes, section 645.08, provides that words and phrases are to be construed

according to their common and approved usage. *Merriam Webster's Collegiate Dictionary, Tenth Edition*, Merriam-Webster, Incorporated, 1996, defines “audit” as “a formal examination of an organization’s or individual’s accounts or financial situation.” Thus, it is reasonable to conclude that government entities can use section 13.392 as a basis to withhold data only when the reason for the audit or investigation revolves around financial issues.

Ms. Gebhard did not provide specific information regarding the issues stemming from the 2007 conference. Nor did she state that the DNR has an internal audit office. She wrote that the Legislative Auditor would investigate DNR activities related to the conference and that the DNR had hired a law firm to “investigate employee misconduct.”

To the extent the Legislative Auditor’s investigation involves financial matters, the DNR may withhold, under section 13.392, “data, notes, and preliminary drafts of reports created, collected, and maintained” by the Legislative Auditor relating to the investigation. Other data are classified as public pursuant to the general presumption in section 13.03, subdivision 1.

To the extent the law firm’s investigation into employee misconduct involves financial matters, the DNR may withhold, under section 13.392, “data, notes, and preliminary drafts of reports created, collected, and maintained” by the law firm relating to the investigation. Other data are classified as public pursuant to the general presumption in section 13.03, subdivision 1.

Finally, once the “final report has been published or the audit or investigation is no longer being pursued actively”, any data classified as not public under section 13.392, become public. In Advisory Opinion 03-018, the Commissioner opined about the status of personnel data in a final report:

The Commissioner notes, however, that the situation here is complicated because the Report appears to contain data about District employees. Data about employees typically are classified pursuant to section 13.43 (personnel data).... Section 13.392 provides that the data in the Report become public and section 13.43 provides that any private personnel data in the Report remain not public....

As Chapter 645 provides, it is important to try to give effect to both section 13.392 and section 13.43....

The Commissioner concludes, therefore, that if the Report contains personnel data classified as private under section 13.43 – and the District is in the best position to make that determination – those data remain private after the final audit/report is published.

In determining the classification of personnel data in the Report, the District should be mindful of the fact that data related to employee complaints/charges and related disciplinary action are classified by section 13.43, subdivision 2(a), clauses (4) and (5).... Thus, if data in the Report relate to a complaint made against an employee, the name of the employee in connection with the fact that a complaint was made and the status of that complaint would be public. If, in relation to that complaint, disciplinary action is taken and a final disposition occurs (see section 13.43, subdivision 2(b)), additional data would become public.

**Opinion:**

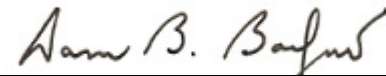
Based on the facts and information provided, my opinion on the issue that Ms. Gebhard raised is as follows:

To the extent the investigations by the Legislative Auditor and the law firm involve financial data, “data, notes, and preliminary drafts of reports created, collected, and maintained” by the Legislative Auditor and the law firm that relate to the investigation are not public pursuant to Minnesota Statutes, section 13.392.

The data relating to the Legislative Auditor’s investigation become public once the Legislative Auditor publishes a final report or is no longer actively pursuing an investigation. However, data that are personnel data are classified pursuant to section 13.43.

The data relating to the law firm’s investigation become public once the law firm publishes a final report or is no longer actively pursuing an investigation. However, data that are personnel data are classified pursuant to section 13.43.

Signed:



Dana B. Badgerow  
Commissioner

Dated:

July 22, 2008